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Case No. 00-391

In The
Supreme Court Of The United States

STATE OF FLORIDA,

Petitioner,

v.

ROBERT A. THOMAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

The question presented in Florida's petition for writ of certiorari was substantially as follows:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT THE ABILITY TO CONDUCT A SEARCH INCIDENT TO AN ARREST OF A RECENT OCCUPANT OF A MOTOR VEHICLE IS CONDITIONED UPON A LAW ENFORCEMENT OFFICER "INITIATING CONTACT" WITH THE DEFENDANT CONFLICTS WITH NEW YORK v. BELTON AND DECISIONS OF FEDERAL AND STATE COURTS?

TABLE OF CONTENTS

PAGE(S)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2-3

STATEMENT OF THE CASE 3-4

SUMMARY OF ARGUMENT 4

ARGUMENT 5-18

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

Chimel v. California,
395 U.S. 752 (1969) . . . . . *passim*

Dunaway v. New York,
442 U.S. 200 (1979) 5

Knowles v. Iowa,
525 U.S. 113 (1998) 7

Maryland v. Buie,
494 U.S. 325 (1990) 8

Maryland v. Wilson,
519 U.S. 408 (1997) 8

Michigan v. Long,
463 U.S. 1032 (1983) 6

New York v. Belton,
433 U.S. 454 (1981) . . . . . *passim*

Pennsylvania v. Mimms,
434 U.S. 106 (1977) 7, 8

United States v. Adams,
26 F.3d 702 (7th Cir. 1994) 15

United States v. Arango,
879 F.2d 1501 (7th Cir. 1989) 9, 10

United States v. Bautista,
731 F.2d 97 (1st Cir. 1984) 10

United States v. Charles,
No. CRIMA00-20022-01-KHV, 2000 WL 575043
(D. Kan. May 1, 2000) 15

United States v. Cotton,
751 F.2d 1146 (10th Cir. 1985) 9, 10

United States v. Fafowora,
865 F.2d 360 (D.C. Cir. 1989) 15, 16, 17

United States v. Franco,
981 F.2d 470 (10th Cir. 1992) 9

United States v. Hudgins,
52 F.3d 115 (6th Cir. 1995) 14, 15, 16

United States v. Karlin,
852 F.2d 968 (7th Cir. 1988) 8, 10

United States v. Mans,
999 F.2d 966 (6th Cir. 1993) 15

United States v. McLaughlin,
170 F.3d 889 (9th Cir. 1999) 7

United States v. Riedesel,
987 F.2d 1383 (8th Cir. 1993) 9

United States v. Robinson,
414 U.S. 218 (1973) 6, 18

United States v. Schecter,
717 F.2d 864 (3rd Cir. 1983) 11

United States v. Sholola,
124 F.3d 803 (7th Cir. 1997) 10

United States v. Snook,
88 F.3d 605 (8th Cir. 1996) 8, 9

United States v. Strahan,
984 F.2d 155 (6th Cir. 1993) 15, 16

Washington v. Chrisman,
455 U.S. 1 (1982) 18

STATE CASES

Cason v. Commonwealth,
530 S.E.2d 920 (Va. Ct. App. 2000) 12

Commonwealth v. Santiago,
575 N.E.2d 350 (Mass. 1991) 16

Gibson v. State,
733 N.E.2d 945 (Ind. Ct. App. 2000) 16

Glasco v. Commonwealth,
513 S.E.2d 137 (Va. 1999) 12

Lewis v. United States,
632 A.2d 383 (D.C. 1993) 17

People v. Bosnak,
633 N.E.2d 1322 (Ill. App. Ct. 1994) 13

People v. Fernengel,
549 N.W.2d 361 (Mich. Ct. App. 1996) 16

People v. Savedra,
907 P.2d 596 (Colo. 1995) 12, 13

People v. Stoffle,
3 Cal. Rptr. 2d 257 (Ct. App. 1992) 13

Pettigrew v. State,
908 S.W.2d 563 (Tex. Ct. App. 1995) 17

State v. Adams,
585 N.W.2d 96 (Neb. Ct. App. 1998) 14

State v. Foster,
905 P.2d 1032 (Idaho Ct. App. 1995) 17

State v. Gonzalez,
487 N.W.2d 567 (Neb. Ct. App. 1992) 14

State v. Howard,
538 So. 2d 1279 (Fla. 5th DCA 1989) 3

State v. Kelly,
963 S.W.2d 866 (Tex. Ct. App. 1998) 17

State v. Porter,
6 P.3d 1245 (Wash. Ct. App. 2000) 16

State v. Thomas,
711 So. 2d 1241 (Fla. 2d DCA 1998) 1, 4

State v. Wanzek,
598 N.W.2d 811 (N.D. 1999) 11, 12

State v. Wheless,
14 P.3d 184 (Wash. Ct. App. 2000) 16

Thomas v. State,
761 So. 2d 1010 (Fla. 1999) . . . . . *passim*

CONSTITUTIONAL AND FEDERAL PROVISIONS

28 U.S.C. § 1257 2

Article I, § 12 Florida Constitution 2

Fourth Amendment of the United States Constitution . . . 2

Fourteenth Amendment of the United States Constitution . 2

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as Thomas v. State, 761 So. 2d 1010 (Fla. 1999). (JA 135-45).

The opinion of the Florida District Court of Appeal, Second District, is reported as State v. Thomas, 711 So. 2d 1241 (Fla. 2d DCA 1998). (JA 130-34).

Respondent filed a motion to suppress which is not reported. (JA 3-14). Following an evidentiary hearing on that motion (JA 15-127), the trial court granted the motion. (JA 128-29).

JURISDICTION

The Supreme Court of Florida issued its decision on October 14, 1999. Petitioner's Motion for Rehearing was denied on June 8, 2000, in light of a revised opinion entered that date. On September 5, 2000, Florida filed a petition for writ of certiorari, which this Court granted on January 8, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article I, § 12 of the Florida Constitution provides in pertinent part:

> Searches and seizures. This right shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be

inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The material facts, as set out by the Florida Supreme Court in the body of its decision, are as follows:

> On the evening in question, Robert Thomas entered the driveway of a residential home in which police were already present making arrests for narcotics offenses. While the detectives were in the residence, Officer Maney waited outside the residence in his patrol car. Officer Maney observed Thomas drive up to the house, park his car in the driveway, and get out of the vehicle. Upon exiting, Thomas walked to the rear of his vehicle, where Officer Maney met him and asked him his name and whether he had a driver's license. A check of Thomas's driver's license revealed an outstanding warrant for a probation violation. Officer Maney arrested Thomas and took him inside the residence. Officer Maney originally was unaware that there were narcotics in Thomas's car. However, a subsequent search after Thomas's arrest resulted in the discovery of a plastic bag containing white residue on the bottom of the driver's side door and three small bags of a white substance in the glove box. All of the bags tested positive for methamphetamine. Five minutes elapsed between the time Thomas exited his car, was placed under arrest, and was brought into the residence and Officer Maney's subsequent search of the vehicle. (JA 135-36).

Based on these facts, the trial court, following a hearing, granted Thomas's motion to suppress based upon State v. Howard, 538 So. 2d 1279 (Fla. 5th DCA 1989). Relying on

New York v. Belton, 433 U.S. 454 (1981), the district court of appeal held the search of the vehicle was not under a preplanned pretext to conduct a warrantless search, therefore the search was lawful as it was incident to the valid arrest of Thomas. See Thomas, 711 So. 2d at 1243. (JA 136).

The Florida Supreme Court reversed, holding that on these facts, the lower appellate court's decision was in error. The court adopted a position which limited any bright-line rule set forth in New York v. Belton, 433 U.S. 454 (1981), to "situations where the law enforcement officer initiates contact with the defendant...." (JA 142-43). The Florida Supreme Court determined that because the defendant did not exit his vehicle upon the direction of the law enforcement officer, Belton did not apply. (JA 143).

SUMMARY OF ARGUMENT

The Florida Supreme Court's determination that the Fourth Amendment forbids a search incident to a valid custodial arrest of a recent occupant, absent the condition that the law enforcement officer initiates contact with the arrestee, is erroneous. Such conclusion is contraindicated by decisions of the Court and erects an inflexible barrier to effective law enforcement. The decision ignores that the arrest itself provides the justification for a search of the arrestee's vehicle.

In so deciding, the Florida Supreme Court added a condition or requirement to Belton which is neither contemplated nor compelled by that decision or any comparable fact scenario. The Florida Supreme Court rejected precedent which embraces the bright-line rule in Belton and instead adopted a diametrically opposite requirement of a case-by-case examination of the facts presented. This latter approach is a hindrance to effective and practical law enforcement because it requires, depending on the factual scenario, a police officer to divine the subjective intent of the arrestee. Under this approach a search could only be conducted of an arrestee who voluntarily exited his vehicle prior to initiation of contact by the officer if that arrestee perceived the police presence. This will likely result in inconsistent application of the law in the lower courts.

ARGUMENT

WHETHER THE FOURTH AMENDMENT REQUIRES THAT A LAW ENFORCEMENT OFFICER INITIATE THE CONTACT WITH AN ARRESTEE BEFORE A VALID WARRANTLESS SEARCH OF THE ARRESTEE'S VEHICLE INCIDENT TO THE ARREST MAY BE CONDUCTED? (RESTATED)

In New York v. Belton, 453 U.S. 454, 460 (1981), the Court created the bright-line rule that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of the arrest, search the passenger compartment of that automobile." *Sub judice*, the Florida Supreme Court determined that the Belton bright-line rule does not extend to a situation where the first contact the defendant has with the officer occurs after the defendant has exited the vehicle of his own accord. Petitioner submits that the correct and more logical view is: If a valid custodial arrest of an occupant or recent occupant of a motor vehicle has been effected, a contemporaneous search of that vehicle incident to that arrest may be undertaken. Any requirement that the officer initiate contact with the arrestee is compelled neither by Belton nor by other persuasive authority nor logic.

In Belton, the Court opined that there be straightforward rules to guide police officers in the exercise of their duties: "'[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" Id. at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)). Indeed, the Belton bright-line rule exists in order to apprise law enforcement of those factors within which they apply and permit consistent application of the rule to circumstances they encounter. Whether a valid search of a recent occupant's vehicle incident to arrest is to be conditioned on the police officer initiating contact with the arrestee serves only to blur, if not totally erode, the Belton principle. It is constitutionally unnecessary to differentiate between an arrest of a recent occupant who may have exited his vehicle of his own volition and a recent occupant who was initially confronted by a police

officer. The same justification for the search exists, namely the concern for officer safety and the need to preserve evidence, regardless of whether the police officer initiates contact with the arrestee. This justification is presumed whenever there is an arrest and there is no need to inquire whether an officer has concern that the arrestee may be armed or whether the arrestee is concealing evidence. United States v. Robinson, 414 U.S. 218, 235-36 (1973). It is the arrest itself, and not who initiated contact with whom, which is the significant constitutional basis to permit a warrantless search.

A Contemporaneous Search of the Passenger Compartment of a Vehicle Incident to the Arrest of a Recent Occupant of That Vehicle is Reasonable Irrespective of Whether the Police Initiated Contact With the Arrestee.

The holding of the Florida Supreme Court represents an unworkable test necessarily involving the subjective impressions of an arrestee which would need to be divined by the courts on a case-by-case basis. This is so because Florida would permit a Belton search where the arrestee exited his vehicle only upon perceiving the police presence or, of course, as a direct result of the police officer's request. Such a determination is a factual and practical impossibility. It is unreasonable to expect a police officer in the field to know whether he may conduct a search of a vehicle based upon the subjective impressions of the arrestee. Arrest alone is the triggering mechanism which permits a search incident to that arrest.

In Michigan v. Long, 463 U.S. 1032, 1049 n.14 (1983), the Court noted that an arrest itself is a significant event which, in and of itself, justifies an "automatic" search incident to that arrest. This Court stated that a Belton search would have been proper had the defendant been arrested. Id. at 1035 n.1. Based upon the Florida Supreme Court's decision, an opposite result would obtain because Long had already exited the vehicle before being confronted by the police.[1]

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[1] In Long, the defendant was observed driving erratically and at an excessive speed. The car swerved off the road and the officers stopped to

As the dissent points out herein, the test employed by the majority undermines the underpinnings of the Belton bright-line rule: "Belton does not add as a condition where the law enforcement officer initiates contact with the defendant either by actually confronting the defendant or signaling confrontation with the defendant." (JA 144). However, the dissent erroneously concurred with the majority in concluding that Knowles v. Iowa, 525 U.S. 113 (1998), was sufficiently analogous to the instant facts, finding that there was no reasonable basis related to the vehicle to search Thomas, nor was there an arrest made related to the vehicle. (JA 144).

Because arrest alone triggers a Belton search, reliance by the Florida Supreme Court on Knowles is misplaced. There was no arrest in the Knowles case, merely the issuance of a traffic citation. The Court, in Knowles, determined that the two rationales relied upon to support a search incident to an arrest, officer safety and the need to preserve evidence, are either not present to the same extent or are not present at all in citation issuance situations as opposed to custodial arrest situations. These rationales **are, however, present in every custodial arrest situation**. That is why the facts surrounding a custodial arrest (such as who initiated contact with whom) are "irrelevant" in applying the Belton bright-line rule. If a valid custodial arrest of a recent occupant of a motor vehicle has been effected, a search of that vehicle incident to that arrest may be undertaken. Or stated otherwise, the issuance of a citation (as in Knowles) is not the functional equivalent of a custodial arrest (as in Belton and as in the instant case), and as between the two, only the arrest can trigger a search of a recently occupied vehicle. Knowles does not and can not control the instant case -- Belton clearly does. See United States v. McLaughlin, 170 F.3d 889 (9th Cir. 1999) (holding that Belton, not Knowles, controls searches incident to arrest).

In the context of a search incident to arrest, the key question ultimately is one of reasonableness. This Court has expressed a concern and recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to the police officers. In Pennsylvania v. Mimms,

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investigate. Long met the officers at the rear of the car.

434 U.S. 106 (1977), the Court held that police may order persons out of an automobile during a traffic stop and may frisk those persons if there is a reasonable belief that they are armed and dangerous. In Maryland v. Wilson, 519 U.S. 408 (1997), this Court extended the Mimms rule to passengers as well as drivers. In these traffic stop scenarios, the liberty interests of the persons detained are significantly greater than those of a person who has actually been placed under custodial arrest. Therefore, in the context of a search incident to arrest, it is reasonable for the police to conduct a search of a vehicle for purposes of officer safety. Likewise, concern for the safety of police officers in the context of protective sweeps made in conjunction with an in-home arrest has been addressed and upheld. Maryland v. Buie, 494 U.S. 325 (1990). If it is reasonable for the police to be able to protect themselves in homes, it is certainly reasonable for the police to be able to protect themselves on the street when they place an individual under arrest. This is true regardless of whether they initiate contact with the arrestee or not. Belton applies in a situation where the defendant has been handcuffed and placed in a squad car. See, e.g., United States v. Karlin, 852 F. 2d 968 (7th Cir. 1988). Certainly, concern for officer safety does not dissipate upon removal of the arrestee from the immediate vicinity of his vehicle where, for example, confederates are present at the scene. Officer safety concerns exist in a custodial arrest situation regardless of whether a police officer initiated contact.

Belton's bright-line rule is not without limits. Indeed, certain factual situations will present temporal and spatial expansion that will render a search unreasonable, but whether the police officer initiated contact is not one of the factors to consider in the reasonableness calculus. Those federal courts which have adopted the Belton bright-line rule rather than the "who initiated contact" rule reflect the more reasonable and workable approach which serves to clarify these boundaries. For example, in United States v. Snook, 88 F.3d 605 (8th Cir. 1996), a police officer received information from the dispatcher that a warrant was outstanding for Snook's arrest and that Snook could be found at a particular location. Upon arriving at that location the officer saw Snook who was just stepping out of his vehicle. The court upheld a search of the vehicle incident to the arrest pursuant to Belton. "The fact that Snook had just stepped out of his vehicle as the officer arrived and

before his arrest does not alter his status as an 'occupant' of the vehicle." Snook, 88 F.3d at 608. In Snook and in this case, it was argued that Belton did not apply since the defendant had just stepped out of the car and was not an occupant at the time of his arrest. Snook, 88 F.3d at 607. The Eighth Circuit explicitly rejected this argument and determined that although Snook stepped out of his vehicle of his own accord, he was an "occupant" for purposes of Belton.[2] See also United States v. Riedesel, 987 F.2d 1383 (8th Cir. 1993) (despite the defense claim that he was not an occupant at the time of arrest, a Belton search was permitted where the defendant was arrested while outside of his vehicle).

In United States v. Franco, 981 F.2d 470 (10th Cir. 1992), the court upheld the search incident to an arrest of a defendant who was in a government truck, and not his own vehicle which was in close proximity, at the time of arrest. "Such a search is permissible notwithstanding the fact that the arrestee is out of the automobile and under the control of the officer. Franco was a recent occupant of his vehicle and the arrest was made in close proximity to his vehicle." Franco, 981 F.2d at 473 (citation omitted). In reviewing the policy considerations behind Belton, the court relied upon its prior decision in United States v. Cotton, 751 F.2d 1146 (10th Cir. 1985), and reiterated that the law does not require the arresting officer to sift through all conceivable possibilities that a weapon or evidence may be within reach of an arrestee before a search may be undertaken.

In United States v. Arango, 879 F.2d 1501 (7th Cir. 1989), the defendant was approximately one block from the scene of the crime at the time of his arrest. The court found the search was consistent with Belton in order to protect persons and

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[2] Under the factual scenario presented, perhaps it would have been more proper for the court to use the term "recent occupant" rather than "occupant." This Court in Belton included the term "recent occupant" in its analysis: "While the *Chimel* case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its **recent occupant**." 453 U.S. at 460.

evidence. The court relied on United States v. Cotton, supra at 1148, quoted in United States v. Karlin, 852 F.2d 968, 970 (7th Cir. 1988), and held the law:

> does not require the arresting officer to undergo a detailed analysis, at the time of arrest, of whether the arrestee, handcuffed or not, could reach into the car to seize some item within, either as a weapon or to destroy evidence, or for some altogether different reason. The facts surrounding each arrest are unique, and it is not by any means inconceivable under those various possibilities that an arrestee could gain control of some item within the automobile. The law simply does not require the arresting officer to mentally sift through all these possibilities during an arrest, before deciding whether he may lawfully search within the vehicle.

Arango, 879 F.2d at 1506-07. The decision in Arango reaffirmed that Chimel[3] and Belton "recognize the need to prevent an arrestee or a confederate[4] from destroying evidence located in the area." Arango, 879 F.2d at 1505. See also United States v. Sholola, 124 F.3d 803 (7th Cir. 1997) (officer asked defendant if he had a car and where it was parked; at time of arrest the defendant was standing near the open driver's side door and could have secured a weapon). Other federal circuits have also sanctioned a Belton search where the initial contact between police officer and arrestee occurred only after the defendant had exited the vehicle of his own accord. See United States v. Bautista, 731 F.2d 97 (1st Cir. 1984) (upholding a Belton search where agents arrested a codefendant

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[3] Chimel v. California, 395 U.S. 752 (1969), held that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area within which he may reach.

[4] Interestingly, when Respondent Thomas parked in the driveway of the Crall's residence, Mrs. Crall, the Respondent's aunt, and Nicki Thomas, the Respondent's sister, were in the house. It is conceivable that, given the right circumstances, one of these nearby "confederates" might have been able to access the contents of the vehicle Thomas was driving.

who was standing beside an open door of a car); United States v. Schecter, 717 F.2d 864 (3rd Cir. 1983) (upholding a Belton search where troopers arrived at scene shortly after accident and found defendant "stumbling about" the auto).

A plethora of state courts have similarly concluded the reasoning of Belton exhibits a more practical policy consideration and promotes an interpretation of the rule which can be easily applied by the officer in the field: A valid custodial arrest of a recent occupant of a motor vehicle is the only condition required to be met in order to conduct a contemporaneous search of the vehicle incident to that arrest. In State v. Wanzek, 598 N.W.2d 811 (N.D. 1999), for example, the court observed:

> We are not persuaded by the line of cases which hold an arrestee is an occupant only when arrested inside the vehicle or where the police initiate contact with the arrestee before the arrestee exits the vehicle. In our view, these decisions undermine the purposes behind the "bright-line" rule established in Belton. The purposes behind Belton were two-fold: to create a single familiar standard to guide police officers in automobile searches and to eliminate the need for litigation in every case to determine whether the passenger compartment of the vehicle is within the scope of a search incident to arrest. (citations omitted) Furthermore, these decisions raise grave public policy issues because they create serious concerns for the safety of officers and others. By drawing a distinction between an occupant and a recent occupant of a vehicle, we would encourage individuals to avoid lawful searches of their vehicles by rapidly exiting or moving away from the vehicle as officers approached. (citation omitted) Police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of the vehicle in order to conduct a valid search. (citation omitted) If Belton is read to preclude searches where police contact occurs after the suspect exits the vehicle, suspects could conceal evidence and weapons by merely stepping outside the vehicle whenever they saw an officer approaching. (citations omitted)

598 N.W.2d at 815. The Wanzek court held that a valid Belton search was conducted where the defendant stepped out of her car immediately prior to arrest and was standing at the rear of the automobile at the time of arrest.

In Glasco v. Commonwealth, 513 S.E.2d 137 (Va. 1999), the Supreme Court of Virginia determined that a defendant, who parked, voluntarily left his vehicle and then walked across the street where the police officer initiated contact, was a recent occupant of a vehicle which could be searched incident to the valid arrest of the defendant. In so holding the court stated:

> [W]e are not persuaded by the authorities that have decided that an arrestee is an occupant or recent occupant of an automobile only if the police officer initiates contact with the arrestee before that person exits the vehicle. That kind of limitation assumes that an individual, who voluntarily gets out of an automobile, is not aware of the presence of a police officer, or having such knowledge, it did not prompt the person to exit the vehicle. We do not believe that those assumptions are always warranted. Moreover, a knowledgeable suspect has the same motive and opportunity to destroy evidence or obtain a weapon as the arrestee with whom a police officer has initiated contact. That suspect could also conceal evidence in the vehicle and effectively prevent an officer from discovering it by getting out of his or her automobile.

513 S.E.2d at 141-42. Relying upon Glasco, the court in Cason v. Commonwealth, 530 S.E.2d 920, 924 (Va. Ct. App. 2000), held that the only prerequisites to a lawful search incident to an arrest are that the search is contemporaneous with the arrest and the arrestee is a recent occupant of the vehicle. Although the officer did not see the arrestee on a moped, the officer saw the arrestee, who was carrying a motorcycle helmet, approach from a location in a nearby yard where he later reported the moped was parked. Because the arrestee was a recent occupant of the moped, the moped was validly searched incident to the arrest.

In People v. Savedra, 907 P.2d 596 (Colo. 1995), the court upheld a Belton search where the arrestee and a passenger had

exited the truck when the police drove into the parking lot where the truck was parked. The court determined that:

> The justification for both the Chimel and Belton rules is clarification of the rights and responsibilities of police officers when faced with an evolving confrontation resulting in arrest. The warrant exceptions created by Chimel and Belton are designed to permit police officers to protect themselves from harm, and to avoid the destruction of evidence. Given that reasoning, it is illogical to distinguish between someone who is ordered out of a vehicle by a police officer and someone who exits the vehicle anticipating or trying to avoid imminent police contact. In both situations suspects are equally capable of concealing evidence or weapons in the vehicle and may be equally motivated to do so.

907 P.2d at 601.

The court in People v. Bosnak, 633 N.E.2d 1322, 1325 (Ill. App. Ct. 1994), assumed the trial judge found that the defendant did not see the officer's emergency lights and that the officer did not make initial contact with the defendant until the defendant parked his car and walked ten (10) yards from it. The court held:

> Where, as in the present case, the officer pursues an automobile based upon his recent observation of the driver's actions, and arrests the driver who has just exited the vehicle and is still within its immediate vicinity, the officer may reasonably consider the driver to be a "recent occupant" within the contemplation of Belton, so that a search of the passenger compartment incident to the arrest will be authorized.

633 N.E.2d at 1326.

Likewise, in People v. Stoffle, 3 Cal. Rptr. 2d 257 (Ct. App. 1992), the court therein held that an automobile search incident to arrest is permitted even though the defendant is not actually sitting in the car when arrested. If a close association with the car is demonstrated at the moment of arrest, the

arrestee is considered a "recent occupant." This can be shown where the arrestee has acknowledged he owns the car, where the arrestee has recently been physically in the car, or where the arrestee is close enough to the car to continue to have access to it.[5]

In contrast, the Florida Supreme Court determined that the Belton bright-line rule does not extend to a situation where the first contact the defendant has with the police officer occurs after the defendant has exited the vehicle of his own accord: "Belton's bright-line rule is limited to situations where the law enforcement officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation with the defendant, and the officer subsequently arrests the defendant regardless of whether the defendant has been removed from or has exited the automobile." (JA 142-43) The Florida Supreme Court found "more persuasive" the decision of the Sixth Circuit in United States v. Hudgins, 52 F.3d 115 (6th Cir. 1995), wherein it was held:

> Our decisions have consistently upheld the search of the passenger compartment of an automobile when the officer initiated contact with the defendant while the defendant was still within the automobile later searched, regardless of whether the defendant was arrested while actually occupying the automobile or after having recently been removed from the automobile.... However, where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fit within Belton's bright-line rule, and a case-by-case analysis of the reasonableness of the search under Chimel becomes necessary....

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[5] Nebraska courts have upheld a Belton search under similar situations. Adopting the reasoning of State v. Gonzalez, 487 N.W.2d 567 (Neb. Ct. App. 1992), the court in State v. Adams, 585 N.W.2d 96 (Neb. Ct. App. 1998), held that a suspect who gets out of his car before a police officer can get out of his is nonetheless still a recent occupant of the vehicle, and a Belton search is justified.

Hudgins, 52 F.3d at 119 (citations omitted).[6] But see United States v. Mans, 999 F.2d 966 (6th Cir. 1993) (finding a Belton search permissible where defendant had exited his vehicle before being asked to stop by officer).

In United States v. Fafowora, 865 F.2d 360 (D.C. Cir. 1989), the court held a search incident to arrest was improper where the defendants were walking away from their vehicle and the contact occurred well outside of the car. The court determined that no bright-line rule is required when the arrestee is not in the immediate vicinity of the car because the Chimel analysis should be employed.[7]

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[6] Previously, the Sixth Circuit had determined in United States v. Strahan, 984 F.2d 155 (6th Cir. 1993), that a defendant who had exited his vehicle and was approximately thirty (30) feet from his vehicle when arrested could not have his vehicle subjected to a search incident to arrest. The court decided that since Strahan was not an occupant of the vehicle when arrested, Chimel, and not Belton, applied. However, an argument can be offered that Strahan was wrongly decided even employing the "who initiated contact" condition. Testimony of the police officers, which was accepted by the magistrate judge, indicated that the defendant hurriedly left his vehicle "because he recognized the police vehicle." Strahan, 984 F. 2d at 156-57. If the defendant felt compelled to move hurriedly because of his perception of the police presence, such "contact" was initiated by the police under the holdings of other courts sufficient to permit a search incident to Strahan's arrest.

[7] Also, in United States v. Adams, 26 F.3d 702 (7th Cir. 1994), the court held a search of a vehicle is not justified incident to arrest where the defendant was not an occupant immediately prior to arrest and was not affirmatively linked to the vehicle until after he was detained and handcuffed. The court relied upon Chimel and observed that the defendant was in no position at the moment of his arrest to remove weapons or evidence. Also relying on the theory that a search of a vehicle incident to an arrest is predicated on the ability of the arrestee to reach into the vehicle to reach weapons or evidence, the court in United States v. Charles, No. CRIMA00-20022-01-KHV, 2000 WL 575043 (D. Kan. May 1, 2000), refused to sanction a Belton search where the government failed to show the defendant was a recent occupant at the time of arrest. Although neither Adams nor Charles deal precisely with the question at bar, it can be inferred from the language used in deciding them that they are more akin to Hudgins,

Some state courts have also embraced the theme that Chimel should guide the question rather than the Belton bright-line rule. In Commonwealth v. Santiago, 575 N.E.2d 350 (Mass. 1991), the court held that where the defendant had already left his automobile by the time the officers apprehended him pursuant to a search warrant and, since the defendant was taken inside his apartment, the automobile "was no longer within the defendant's immediate control." Thus, there "was no danger that he could draw a weapon from the vehicle or attempt to conceal or destroy contraband which remained in it." 575 N.E.2d at 353-54. Similarly, in Gibson v. State, 733 N.E.2d 945 (Ind. Ct. App. 2000), a defendant was arrested on an outstanding warrant after having parked his van at a convenience store and exited the vehicle. The court held that the subsequent search should have been limited to the defendant's person and should not have extended to the vehicle. The court determined that a search of the vehicle incident to the arrest was improper because "[t]he interior of the van was not within the area of Gibson's immediate control, the area from within which he might have gained possession of a weapon or destructible evidence." 733 N.E.2d at 955.[8]

Citing Hudgins, supra, as persuasive and adopting its reasoning as its own, the Court of Appeals of Michigan held that Belton did not apply where the defendant voluntarily exited his vehicle and was not in control of the vehicle at the time of arrest. People v. Fernengel, 549 N.W.2d 361 (Mich. Ct. App. 1996). The defendant was arrested on an outstanding warrant when he was approximately twenty (20) to twenty-five (25) feet

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Strahan and Fafowora, cases which have added an unreasonable limitation of Belton. These cases have unnecessarily relied upon the Chimel reasoning rather than the more expansive holding of Belton.

[8] Also, the court in State v. Porter, 6 P.3d 1245 (Wash. Ct. App. 2000), in reliance upon the "greater protection" of the Washington state constitution, held that where a van was not within the immediate reach of an arrestee at the time of arrest no search of the van incident to the arrest could be maintained. The arrestee, due to being three hundred (300) feet away from the van, had no opportunity to destroy evidence or obtain a weapon from inside the van. See also State v. Wheless, 14 P.3d 184 (Wash. Ct. App. 2000).

away from his van. See also State v. Foster, 905 P.2d 1032 (Idaho Ct. App. 1995) (a warrantless search incident to arrest is limited to a search of a vehicle that was occupied by the defendant at the time of arrest or when police contact was initiated.); Lewis v. United States, 632 A.2d 383 (D.C. 1993), (holding that where the defendant had parked and locked his vehicle and had walked approximately fifteen (15) to twenty (20) feet away from the car when he was stopped by a police officer, the defendant was not an "occupant" and, therefore, a Belton search was not warranted).[9]

The court in State v. Kelly, 963 S.W.2d 866 (Tex. Ct. App. 1998), disallowed a Belton search where the defendant exited his vehicle prior to police contact and where the defendant was removed by time and space from the vehicle at the time of arrest. In determining whether the defendant was a "recent occupant" at the time of his arrest, factors such as temporal and spatial proximity are to be considered. Where the defendant had been out of his car for approximately ten (10) minutes and was physically distanced from his vehicle at the time of arrest, he was no longer a recent occupant and the justification for a Belton search did not exist. But see Pettigrew v. State, 908 S.W.2d 563, 570 (Tex. Ct. App. 1995) ("Applying the bright-line rule to this case, the search of appellant's car was a lawful search incident to arrest because the police officers observed appellant driving the vehicle immediately prior to arresting him only feet from where the vehicle was parked. Abandoning the 'recent occupant' provision would create an incentive for detainees to attempt to flee the scene to avoid a search.").

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[9] The facts of Lewis show that the officer saw the defendant operate and park the car and that the officer "approached that car and the defendant got out of the car." 632 A.2d at 384. There is no indication that the defendant was aware of the officer's presence until he was "stopped rather quickly" some fifteen (15) feet from the car. Id. Following United States v. Fafowora, supra, the Lewis court concluded that the rule allowing a search of a vehicle incident to arrest is confined to cases where police confront or signal confrontation while the defendant is an occupant.

Arrest Alone is Sufficient to Conduct a *Belton* Search Without Regard to Whether the Police Officer Initiated Contact With the Arrestee.

In Washington v. Chrisman, 455 U.S. 1, 7 (1982), this Court envisioned the potential dilemma and held:

> Every arrest must be presumed to present a risk of danger to the arresting officer. Cf., United States v. Robinson, supra, at 234, n.5, 94 S.Ct. at 476, n.5. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious. Although the Supreme Court of Washington found little likelihood that [the defendant] could escape from his dormitory room, an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after the fact assessment of the particular arrest situation. Cf., New York v. Belton, 453 U.S. 454, 458-460, 101 S.Ct. 2860, 2863-2864, 69 L. Ed. 2d 768 (1981); United States v. Robinson, supra, 414 U.S. at 235, 94 S. Ct. at 476. (emphasis supplied).

Mandating a court to determine the intent of the arrestee at the time contact is initiated severely limits the holding of Belton and, indeed, is contraindicated by the precedent of this Court. Moreover, requiring a police officer to make a subjective decision on the spot as to whether the arrestee exited his vehicle upon perceiving the police presence results in an impracticable test and not the clear cut guidance fostered by Belton. A valid arrest of a recent occupant of a motor vehicle, without more, justifies a search incident to arrest under Belton. It is constitutionally immaterial whether the officer initiates contact with the arrestee.

CONCLUSION

Based on the foregoing, the Petitioner respectfully submits that the decision of the Florida Supreme Court should be reversed.

Respectfully submitted,

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